United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1138

To be argued by
Stanley H. Fischer

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1138

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS R. WOLFISH,
Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT.

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On the Brief:
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POINT I

THE INSTRUCTION TO THE JURY THAT ONLY NOT "UNREASONABLE" INFERENCES MAY BE DRAWN FROM APPELLANT'S FAILURE TO TESTIFY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS SECURED BY THE FIFTH AMENDMENT.

A speculation is mere guesswork or surmise (and not serious thought) whereas an inference is a proposition deduced as a logical consequence from other facts or a state of facts already proved or admitted. The two words convey meanings worlds apart.

The charge clearly permitted the jury to make reasonable unfavorable inferences of which many were available, since the case rested on inference and circumstantial evidence.

For instance, there was only one identification of appellant, which was hazy at best. The jury may well have considered the inference which could be drawn fromWolfish's failure to testify - that he could not deny his presence at the Israel Consulate - a decisive element. (See Virgin Islands v. Bell, 392 F 2d 207) or that Wolfish received his mail or that he wrote certain documents, or that he opened the Dime Savings Bank accounts.

Counsel objected to the charge (360 a). And even had he not, can more significant plain error exist? VIRGIN ISLANDS v. BELL, 392 F 2d 207 (3rd Cir. 1968), HENRY v. MISSISSIPPI, 379 U.S. 443.

GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965), FONTAINE v. CALIFORNIA, 390 U.S. 593 (1968), VIRGIN ISLANDS v. BELL, 392 F 2d 207 all prohibit the Court from solemnizing the silence of the accused into evidence against him.

POINT II

THE INFLAMMATORY REFERENCE TO APPELLANT'S RELIGIOUS ETHICS AS A RABBI, DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The appellant never took the stand. He did not put his character in issue! Nonetheless, the prosecutor in those several lines at issue charges the appellant with defaming his parents, disobeying the Ten Commandments and denying his religion. The statement was totally irrelevant to the trial, inflammatory and could have only been made with intent to prejudice a jury (unless it was another "slip of the tongue"). Objection was

strenuously taken by defense counsel.

Since in the instant case the direct evidence is spotty at best and the case rests on circumstantial evidence and inferences, the statement of the prosecutor could well have been decisive in the verdict.

In none of the cases cited by the government was an attack made against a defendant. In LAWN v. UNITED STATES, 358 U.S. 399, 359-60 n 15 (1968), the prosecutor vouched for witnesses; in UNITED STATES v. BENDER, 457 F 2d 1174, 1176 (2nd Cir. 1972), the prosecutor attacked the defense of "frame"; in UNITED STATES v. GREENBANK, 491 F2d 184, 186 (9th Cir. 1974), the argument referred to prosecutor's knowledge; in UNITED STATES v. De ANGELIS, 490 F 2d 1004 (2nd Cir. 1974), the prosecutor recapitulated the testimony of a witness and argued that the testimony of a witness should not be believed. In the instant case, a direct personal prejudicial attack was made against defendant by the prosecution.

The case of United States vs. Bentner, 457 F2d 1174, cited by the government in its answering brief clearly does not support the government's position but rather the contention of the Appellant. In that case the Second Circuit held that the Summation by the Assistant U.S. Attorney was improper but did not reverse on the grounds that defense trial counsel never took objection to the improper summation by the Government.

Accusing the defendant of lying and repeatedly indicating that the defense was "fabricated" was "unwise", "unnecessary", and "intemperate" and "inconsistent" with duty of a prosecutor to"seek justice, not merely to convict, " as delineated in the ABA Code of Professional Responsibility Final Draft, 1969, Ethical Consideration 7-13, at 79, Chief Judge Irving R. Kaufman's words of admonition, "A few injudicious words uttered in the heat of battle by an Assistant United States Attorney may undo months of preparation by police, prosecutorial, and judicial officers." The question that prosecutors may well ask themselves is of what value is the questionable advantage gained by sharp comment on summation if the case is later reversed on appeal? (United States vs. White, 486 F2d 204, 2nd Cir., 1973)

Government may not introduce evidence of bad reputation unless defendant has put his reputation in issue. United States vs. Marrero, 486 F.2d 622 (1973).

Unless and until the accused puts his character at issue by giving evidence of his good character or by taking the stand and raising an issue as to his credibility, the prosecutor is forbidden to introduce evidence of the bad character of the accused simply to prove that he is a bad man likely to engage in criminal conduct. United States vs. Wright, 489 F.2d (1973).

POINT III

THE NOTICE OF READINESS FILED BY THE PROSECUTION WAS FALSE AND VIOLATED THE "SOUTHERN DISTRICT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES"

Although the government in its answer on this point seeks to deflate the significance of the exemplars to its prosecution, it contradicts its own argument to POINT IVA on page 24 wherein it states:

> "The request for additional exemplars here was the product of the fact that Mrs. Tamir, without them, had been unable to reach definitive conclusions of authorship of certain questioned writings".

Without the exemplars, how could the government present its case?

In UNITED STATES v. IZZI, 427 F 2d 293 (2nd Cir.), cert denied 394 U.S. 428 (1970) and UNITED STATES v. ROTHMAN, 463 F 2d 488 (2nd Cir. 1972), cert denied 409 U.S. 656 (1972) the issue herein viz. the sixth month rule was not even raised. In UNITED STATES v. POLLAK, 364 F Supp 1047, 1050 (S.D.N.Y.) the government did not seek positive relief to go forward as herein (the exemplars) but only failed to comply with a defense request (Bill of

Particulars). UNITED STATES v. PIERRO, 478 F 2d 386 (2nd Cir. 1973) dealt with a clerical error.

Appellant pro se moved to dismiss the indictment, which was subsequently reiterated by his counsel on January 6, 1975. United States vs. McDonough, (2nd Circuit); 504 F.2d 67.

The fact of the matter is that the government was not ready to try its mail fraud case without the exemplars and its notice of readiness was therefore a sham.

POINT IV

A. THE USE OF THE COURT-ORDERED EXEMPLARS BY THE PROSECUTION AS A "DISGUISE OF APPELLANT'S HANDWRITING" CHANGED THE STATUS OF THE EXEMPLARS TO A TESTIMONIAL ACKNOWLEDGEMENT OF GUILT, IN VIOLATION OF THE FIFTH AMENDMENT.

The Appellee has missed the point. Appellant challenges the use by Appellee of the alleged disguised handwriting as a testimonial acknowledgement of guilt. This use is obvious from the summation.*

*Ladies and gentlemen, I submit to you isn't Mr.Wolfish's disguising of his own handwriting another clear item of evidence which indicates a clear unmistakable evidence of guilt in this scheme to defraud? (326a).

This issue has been left open in UNITED STATES v. IZZI, 427 F.2d 293 (2nd Cir. 1970) and in UNITED STATES v. STEMBRIDGE, 477 F.2d 874 (5th Cir. 1973).*

As testimonial acknowledgement of guilt the government and the Court should have applied the safeguard requirements of the Fifth Amendment. As a matter of fact, at the time of the taking of the exemplars (which had only once been adjourned due to scheduling on a religious holiday), the government advised appellant of his Miranda rights (P.10 Tr, Pre-Trial Hearing, Dec. 23, 1974) but when he insisted that his counsel be present he was told that if he didn't give exemplars, that he would be held in contempt. See Massiah v. U. S., 377 U.S. 201. He was thus coerced to give exemplars.

The appellant at trial moved to exclude the exemplars on the grounds that his Fifth Amendment rights were violated in that counsel was not present as requested (Tr 381-2). The Court reserved decision and said it would hold a hearing thereon.** However, no hearing was ever held.

*A similar contention was presented to the Second Circuit, in United States v. Izzi, 427 F.2d 293 (2Cir.1970), which concluded that the contention was unsupported by the record and, therefore, did not decide the issue. The instant case could also be considered one in which the record does not support the contention, because the record clearly shows that the prosecution obtained the expert's opinion that the exemplars were disguised not as an implied admission of guilt by Jessie but rather as an explanation of his difficulties in analyzing the handwriting in order to substantiate his analysis after a rigorous cross-examination challenging its validity. At 875.

MR. SCHATTEN: If I hadn't advised him of his Miranda rights and advice to him that I was prepared to seek whatever contempt procedures were possible, he would not have gone ahead on the third occasion. (P.10 Tr., Pre-Trial, Dec. 23, 1974).

DEFENDANT WOLFISH:

I have one other thing to make an application on.

MR. ROSEN: The defendant has asked me for permission -- let me make it. What do you want me to say?

(Mr. Rosen and the defendant conferred.)

THE COURT: I don't want to hear it, Mr. Wolfish, and you tell your counsel what you want.

MR. ROSEN: I would like to move, further, to exclude the handwriting exemplars, the 50 series, on the grounds that Mr. Wolfish did not -- on the grounds that I wasn't there physically and that he insisted that I be present at the taking of the exemplars. (Tr. 381)

THE COURT: I'll reserve decision on that and we'll have a hearing on that question between now and the end of the Government's case.

That means that, well, all of the facts will have to be elicited in such a hearing out of the hearing of the jury.

I do recall that there was reference to all of this during suprression hearings, if I am not mistaken --

MR. SCHATTEN: That's correct.

MR. ROSEN: I don't believe so.

THE COURT: Well, perhaps it was when we had discussion on the question of counsel representing Mr. Wolfish and my recollection is that Mr.Wolfish said that he called you, Mr. Rosen, and you told him that something prevented your being there and told him to go ahead, but we don't need to really get into that now. We will have a hearing on it. (Tr. 381-2)

B. THE COURT ERRED IN PERMITTING THE TESTIMONY OF THE HEBREW HANDWRITING EXPERT, SINCE THE CONCLUSION WAS BASED ON NON-AUTHENTICATED SAMPLES.

The appellee's second paragraph* reiterates the error below, which the Trial Court disputed and ordered stricken.**

Exhibits 45A and B were never "known". The Court recognized that many logical possibilities existed insofar as the authorship of 45A and B and for that reason, did not find them to be authentic.*** As a matter of fact, Eliezer Chaim is not the translation of Louis R.

*"Mrs. Tamir, the handwriting expert, testified that her conclusion that Wolfish was the author of the black pencil notations on the altered death certificate of Wolfish's mother(GX30) was based on an analysis of the document and the samples of Wolfish's known handwriting - i.e., on the Court-ordered exemplars and government Exhibits 45A and 45B" p.25 (emphasis added).

**The Court: I have directed that the word "known" be stricken from 66 and I am going to ask it also be stricken from 63 in its present form, and I think you should - I want you to disregard the word "known" to the extent it has been used in connection with 45A and 45B. (302a)

***THE COURT: Maybe Mrs. Wolfish wrote it herself. (299a)

-and -

THE COURT: Don't you have a problem? Doesn't logic and reason suggest that if indeed whis were a scheme devised by someone other than defendant that in all likelihood they would try to develop it in the fashion in which it has occurred here? You wouldn't pick my name to sign at the end of the letter, you would pick Louis Wolfish's name. (300a)

Exhibit 45A and B were photostats* Mrs. Tamir did not produce the originals and, therefore, the defense could not determine if the letters were tracings (as were other documents). (See Blackwell vs. United States, 244 F2d 423., Cay vs. United States , 118 F2d 160, United States vs. Gassaway, 456 F2d 624,1972)

Since neither Mrs. Tamir nor the Court authenticated Exhibits 45A and B, any comparison based thereon was erroneously admitted, was prejudicial and mandates reversal.**

POINT V

APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO CONFRONTATION AND CROSS EXAMINATION BY THE ADMISSION INTO EVIDENCE OF THE GRAND JURY TESTIMONY OF A WITNESS, WHO NEITHER ADMITTED THE TRUTH OF IT, NOR THAT HE GAVE IT AND WHO CLAIMED HIS FIFTH AMENDMENT PRIVILEGE.

The trial testimony on direct of Horowitz indicated that Wolfish picked up mail, not "all mail addressed to the Wolfishes" as appellee asserts (128a); that others had access, not "no one other than Wolfish picked up such mail" as appellee asserts (127a). Both his direct and cross-examination evoked testimony at variance with the Grand Jury testimony.

Horowitz invoked the Fifth Amendment when asked if he signed Governments Exhibit 25, a key mail receipt. It was never

*Objection was taken that 45A & B were not even originals (170a,171a)

**It should also be noted that 45A and B were objected to under the Best Evidence Rule in that they were not originals, but photostats. (Tr 671,675,563; 170a-172a) United States vs. Duncan, 503 F2d 1021 (1974).

answered and thus prevented the defense from further pursuing via Exhibit 25 whether Horowitz, in fact, received the mail and forged Wolfish's signature.

Horowitz again invoked the Fifth Amendment when the defense sought to show that the letter requesting information regarding death certificates which was received by Mr. Mack was Horowitz' document. This was part of the defense that it was Horowitz who was the culprit.

Appellee incorrectly states that appellant did not object below. Lengthy objection was made.*

*TO THE COURT: I therefore rule that the Grand Jury transcript is admissable as affirmative evidence of whatever is contained therein.

MR. ROSEN: May I take exception to the rules?

THE COURT: Yes. State them specifically, please.

MR. ROSEN: On the question of the Grand Jury testimony, I think that clearly in this particular case, when the witness has taken the Fifth Amendment, and I put some rather direct questions, I thought, to him, to allow this type of Grand Jury testimony where he perhaps implicates himself, but certainly I don't think he has been subject to cross-examination at that time; I think that it is highly prejudicial to Mr. Wolfish to put in a prior statement. The man said he did not recall the testimony, but he didn't deny it either.

Now he was called as a Government witness. They vouched for his veracity and when he didn't turn out to their liking, they now try to use the Grand Jury testimony affirmatively against the defendant.

I think it is improper and I except to your Honor's ruling.. (164a, 165a).

THE COURT: While we are waiting the Grand Jury testimony of Mr. Horowitz you offered and that is received. Let's mark this as 43-C. Is that satisfactory?

MR. SCHATTEN: Yes, sir.

The issue was not hearsay, but denial of right of confrontation since Horowitz could not be examined about testimony, he could not recollect or on which he asserted his individual constitutional protection, and which may have shown him to be the perpetrator.

POINT V

B.

THE COURT'S FAILURE TO ADMONISH THE JURY THAT THEY "MUST NOT USE THE REFUSAL TO ANSWER BY A WITNESS AS EVIDENCE OF WHAT THE ANSWER WOULD HAVE BEEN" WAS ERROR.

In the instant case the government took advantage of Horowitz', an alleged hostile witness, invoking of the Fifth Amendment to introduce the Grand Jury testimony and at least create a possible inference to the Jury that this brother-in-law was shielding the defendant and was himself involved. In this respect, Namuet v. United States, 373 U.S. 179 is distinguishable by its own language:

"Thus the present case is not one, like Maloney, in which a

*(cont'd) THE COURT: 43-C is received in evidence. (Government's Exhibit 43-C received in evidence).
MR. ROSEN: Your Honor, I respectfully except to that. (TR331).

witness' refusal to testify is the only source, or even the chief source of the inference that the witness engaged in criminal activity with the defendant." (at 189)

POINT VI

SUGGESTIVE IDENTIFICATION PROCEDURES THAT EFFECTED THE IN-COURT IDENTIFICATION OF APPELLANT AND AN INADEQUATE CHARGE TO THE JURY ON THE SUBJECT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR CONFRONTATION AS SECURE BY THE SIXTH AMENDMENT.

Mrs. Bahrev never testified that the basis of her in-Court identification was her recollection of the man who had come to her desk at the Consulate as incorrectly asserted by Appellee. on the contrary, she satated:

Q. In your mind, when you selected the picture, were you assisbecause of the dissimilarity in the photographs?

A. Well, it's very hard to say how the human mind works, but it might have been. I don't know." (255a)

Cases cited by appellee are unequivocal identification whereas herein the identification was equivocal at best.

An analysis of the NEIL V. BIGGERS, 409 U.S. 188 criteria, as stated in appellant's main brief, reveals that not only was there an undisputed permissable suggestive procedure in the instant case, but that there was a substantial likelihood of misidentification.

POINT VII

THE COURT SHOULD HAVE DIRECTED THE GOVERNMENT TO TURN OVER ANY REPORTS CONCERNING A TYPEWRITER IN HOROWITZ' POSSESION.

The Government now concedes that exemplars were taken from the Horowitz typewriter. These the defense contends were exculpatory in anture. Since an examination of these exemplars with the letter written to Emanuel Mack would have shown that the letter to which Horowitz invoked the Fifth Amendment had, indeed, been written on his typewriter and would have supported

the defense that others were the perpetrators. The exemplars should have been turned over.

POINT VIII

A.

APPELLANT'S CONSTITUTIONAL RIGHT TO RETAIN COUNSEL OF HIS OWN CHOOSING SECURED BY THE SIXTH AMENDMENT WAS VIOLATED.

Appellant at no time was dilatory. He brought the counsel issue before the Court as early as three weeks before the scheduled trial date. The Court refused to hold a hearing on the question, summarily disregarded numerous affidavits of witness' to appellate selection of Roy Cohen personally. Instead, the Court directed Mr. Rosen to try the case when it could just as well directed Roy Cohen, or at the very least, hold a hearing on the issue. Cases cited by appellee are inapposite, since they are eve of trial situations.

B.

THE DEPRIVATION OF THE RIGHT OF APPELLANT TO PARTICIPATE IN AND MANAGE HIS OWN DEFENSE WAS A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

Appellant is an attorney duly admitted and currently

in good standing in both the Southern District and the Second Circuit. His disbarment in New York State Court was totally unrelated to the charges herein and occurred after some 13½ years of practice as a negligence attorney.

Appellant had a constitutional right to counsel of his own choosing, namely himself as a co-counsel (particularly after the Cohn-Wolfish issue arose). If he had retained three or five other lawyers to represent him as co-counsel, he certainly would not have been required to discharge Rosen prior to that retention. Why would he have to do so, if he selected himself?

POINT IX

A.

THIS COURT SHOULD EXAMINE SEALED COURT EXHIBIT 4 TO DETERMINE WHETHER SAME SHOULD HAVE BEEN SHOWN TO DEFENSE COUNSEL.

The appellant respectfully asks the Court to examine the Court sealed Exhibit 4 to determine whether they constitute Brady material, Jenks material or material relating to the Israel search.

POINT X

THE COURT ACTED ARBITRARILY IN NOT PERMITTING THE DEFENDANT TO COMPLETE THE SUPPRESSION HEARING

Appellant only learned of the full involvement of Mallon, Roth and Toffit at the suppression hearing* and was surprised that the government had not called these individuals. (Tr. 49, 84 and 89, Suppression Hearing, January 6, 1975)

John Mallon and John Toffit are State Department officials and Commander Roth was an Israeli Police Official. All were apparently involved in the proceedings in Israel, at least two weeks prior to the Israeli search.

POINT XI

THE DISTRICT COURT ERRED IN NOT DISMISSING THE INDICTMENT BASED UPON AN INSUFFICIENCY OF THE EVIDENCE UNDER 18 U.S.C. 1341

There was not one iota of proof that Wolfish used the mails or caused anyone to use the mails, even though the mails may have been used.

*Including that the U. S. Attorney had a conversation with Mallon. (Tr. 42-43, Suppresion Hearing, January 6, 1975 and 78,

Insofar as the appellee's argument that "common experience alone suggested the high probability of the insurance company's use of the mails in these circumstances", Count III belies the argument, since the insurance company personally sought to deliver the check by hand. Furthermore, the alleged testimony of Bahrev would indicate that appellant was not adverse to making personal contacts without the use of the mails. Nor was there any evidence that appellant knowingly caused Bankers Security to use the mails. U.S. v. BRIGHT, Docket No. 74-2447, decided May 21, 1975, (Second Circuit).

POINT XII

THE FAILURE BY THE COURT TO ORDER SUA SPONTE PATE MENTAL COMPETENCY EVIDENTIARY HEARING VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS SECURED BY THE FOURTEENTH AMENDMENT.

The question is not whether Wolfish or his attorney feel that Wolfish is competent, but whether or not the Court feels that the defendant is competent and the Court, after raising the issue, could only determine the issue by a hearing. It is particularly significant, since denial of counsel was

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 1138/75

UNITED STATES OF AMERICA,

Plaintiff

against

LOUIS R. WOLFISH,

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
Two Park Avenue, New York, N.Y. 10016

That on June 19th, *19* 75 *deponent served the annexed* REPLY BRIEF

on STEVEN SCHATTEN, U.S. District Attorney

attorney(s) for Plaintiff

in this action at United States Courthouse, Foley Square, N.Y., N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me June 19, 1975

Debra Bokunieiwcz
The name signed must be printed beneath
DEBRA BOKUNIEIWCZ

STANLEY H. FISCHER
NOTARY PUBLIC, State of New York
No. 41-6305785
Qualified in Queens County
Term Expires March 30, 1976

rendered in part upon the question of competency. TILLARY v. EYMAN, 492 F.2d 1056 (1974).

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

STANLEY H. FISCHER
Attorney for Appellant